Supreme Court, U.S
FILED

(1)

No. _____ 971931 FEB 5 1998

**********OFFICE OF THE CLERK

In The Supreme Court

Of The

United States

October Term, 1997

Jake Vanner, Sr.
Petitioner

VS.

Dr. "Charlie" Bridges, And
Our Lady of The Lake Medical Center, et al
Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

****

PETITION FOR WRIT OF CERTIORARI

****

JAKE VANNER, SR.
Petitioner in Proper Person
6162 Peyton Drive
Baton Rouge, Louisiana 70811
(504) 357-0187

28 pp

QUESTIONS PRESENTED

1. Did the petitioner in this case receive Due Process of Law from the State of Louisiana, considering the fact that he has been denied a hearing on the merits of his argument regarding the failure of the District Court Judge to grant him a continuance in this case?

2. Is there manifest error which contsitutes Due Process of Law in this case, considering the fact that the District Court Judge granted Mover's Motion for Exception of No Cause of Action Based Upon Prescription, when the record shows that petitioner raised a defense to the Motion of Exception of Prescription?

3. Did the Supreme Court of the State of Louisiana err along with the other lower courts' decisions when they tailed to grant petitioner a hearing on his motion for a hearing on the merits regarding his defense in this case?

4. Is there Manifest Error in this case which requires granting a Writ to determine whether there are conflicting state appeals court decision which petitioner alleges exist in this case?

5. In the interest of justice, should this case be REMANDED to the State of Louisiana Courts for further review and consideration, which will form the Due Process of Law Requirements petitioner contends are absent in this case?

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1. The First Circuit Court of Appeals decision conflicts with the decision of the Third Circuit Court of Appeals of Louisiana regarding the process required to be followed by a state court judge at the district level when the court is present with the issue of whether or not time ceased or continued in circumstances which are present in this case.

2. The District Court and the Appellate Court for the First Circuit Court of Appeals have drawn conflicting conclusions regarding the law as it is used in this case.

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TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION:

14th Amendment

Cases:

McKeithen vs. LeBlanc, 491 So.2d 807 (La.App.3rd Cir. 1986).

Richardson vs. Moffett, 608 So.2d 275 (La.App. 3rd Cir. 1992).

Maug-U vs. May, 556 So.2d 221, 225 (La.App. 2nd Cir. 1990).

Griffin v. Kinberger, 507 So.2d 821 (La. 1987).

Gordova vs. Hartford Acc. & Indem. Co., 387 So.2d 574 (La. 1980).

Louisiana Articles and Provisions:

R.S. 40:1299(B)(2)

R.S. 95628

Louisiana Acts:

1975, No. 817; Section (A)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

Jake Vanner, Sr.

Petitioner

v.

Dr. "Charlie" Bridges, And
Our Lady of the Lake Hospital, et al

Respondents

Jake Vanner, Sr., respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Louisiana

OPINIONS BELOW

The opinions of the First Circuit Court of Appeals and the district court in the 19th Judicial District are unreported.

JURISDICTION

The Supreme Court of the State of Louisiana entered its Judgment on September 27, 1997, and its decision on reconsideration on November 7, 1997. The jurisdiction of this court is invoked under 28 U.S.C. and 1254 (1).

LEGISLATION INVOLVED

None. This case concerns judicially announced doctrines and process regarding procedural protection for case process.

LIST OF PARTIES

The two defendants in this case are Doctor Charlie Bridges, the treating physician in this case, and the hospital in which the program for sexual dysfunction was administered, Our Lady of the Lake Hospital.

STATEMENT OF THE CASE

This litigation started out as a medical malpractice claim filed by Jake Vanner, Sr. with the Patient Compensation Fund of Louisiana. Mr. Vanner learned sometime in 1993 that he had been misled by certain professionals, including but not limited to his attorney and other attorneys referred to him by his original attorney. Also, Jake Vanner learned that his treating physician and a psychologist that his claim was not what it appeared to be. Upon learning that he had a medical malpractice claim that Louisiana law protested under circumstances where professionals misled a potential claimant, Jake Vanner proceeded to file his claim with the Patient Compensation Fund in East Baton Rouge Parish, Louisiana. His claim continued to move forward in the administrative arena provided for such process until the respondents in this case, Dr. Charlie Bridges and Our Lady of the Lake Hospital, retained the services of lawyers and proceeded to exception motions in the 19th Judicial District Court system, challenging the right of your

petitioner to move forward in this case based upon prescription. Mr. Jake Vanner objected to these motions and filed in a timely manner pleadings with the 19th Judicial District Court. One of the motions filed by Jake Vanner was a motion to continue the date which was set to hear the case set on motions of exception by the respondents in this case. Jake Vanner was never heard on the merits of his motion for a continuance by the state court judge. Jake Vanner, Sr.'s motion for a continuance was summarily denied and the motions offered by the defending parties to the malpractice action was granted. Mr. Vanner asked the district court to allow him more time to prepare his defense to the motions of exception; however, to no avail with the state district court judge. The court never allowed Jake Vanner additional time to get witnesses needed to make his argument against the hospital and Dr. Charlie Bridges. Mr. Vanner never had a hearing on the merits of his motion for a continuance, nor has he ever had the opportunity to be heard on his defense against the motions exception of Mr. Vanner's malpractice claim on prescription. Mr. Vanner was denied a right to be heard at the district court level. Jake Vanner appealed to the First Circuit Court of Appeal. On the first round of appeal, the Appellate Court remanded for procedural and other violations by the State District Court Judge. After another hearing with the same judge, the State

District Judge again denied the pleadings made by Mr. Vanner. Again, Mr. Vanner applied for writs from the Supreme Court of the State of Louisiana. Mr. Vanner's writ application was denied by the State Supreme Court, and again denied on a rehearing application on November 7, 1997. It is from these denials by the state courts of the State of Louisiana that Mr. Vanner is applying for Writs of Certiorari from the Supreme Court of the United States.

REASONS FOR GRANTING THE PETITION

1. The decision rendered by the First Circuit Court of Appeals for the State of Louisiana conflicts with an earlier decision rendered in the Third Circuit Court of Appeals for the State of Louisiana which talks about the petitioner in a malpractice claim who is challenged in the court of law by way of a motion of exception of prescription, and in which a claimant raises the defense that time did not continue to run due to professional misrepresentation to claimant. Petitioner contends that this case meets that test of which the state courts overlooked or disregarded in the instant case.

Petitioner contends that he has not had his day in court in this case. Petitioner contends that the State of Louisiana did not protect his rights when the district court judge did not grant (at least) a hearing on the merits of his motion in regards to the need for his continuance. The

state court judge ignored all of the potential legal damage that could result by the court's failure to hear petitioner's argument for the continuance and, also, to consider petitioner's need to show the court why the court should hear what he could prove or disprove in his defense of the exception motion made by respondents in this case. The state court just summarily dismissed petitioner's motions. Petitioner argues that his right to be heard is far outweighted by any state interest in judicial economy or interest of any party related to this matter. Louisiana law provides that a mover can defeat a motion of exception of prescription, if said mover can show the court that at some point during the process of the basis for his malpractice claim (time, in fact, legally stopped); however, Louisiana did not give Jake Vanner, Sr. the opportunity to, at least, make a legal showing that under Louisiana law, time stopped for the purposes of his medical malpractice complaint.

Petitioner shows that one of the ways in which Louisiana law allows a medical malpractice claimant to show that time stopped running in a case is by showing that the claimant was misled by PROFESSIONALS. In this case, Jake Vanner, Sr. was going to do just that; however, Louisiana State court judges have not allowed it to happen. Petitioner asks the court for more time to call witnesses needed to make this defense and was summarily denied any such opportunity.

Also, petitioner informed the court that he may in fact acquire the services of an attorney at law if the court would allow him to have more time to prepare his defense to the motions of Dr. Charlie Bridges and Our Lady of the Lake Hospital, but petitioner was summarily denied. Petitioner contends that the failure of the state courts to allow this legal access denied both his substantive and procedureal due process of law.

CONCLUSION

Petitioner argues and contenss that the 14th Amendment to the United States Constitution protects him against arbitrary and abusive disregard for these safeguards to due process of law. Petitioner argues that the State of Louisiana has in fact violated said process. Petitioner shows this Honorable Supreme Court of the United States that in the decision of the Third Circuit Court of Appeals for Louisiana, in the case of McKeithen v. LeBlanc, 491 So.2d 807 (La. 3rd. Cir. 1986), Louisiana Appellate Judges ruled that a state court judge, when confronted with a motion from a complaining party that prescription has stopped in a matter, and when the defending party is attempting to summarily deny the case based on the running of prescription, before the court can grant the exception on prescription, the court must hold a full evidentiary hearing in the case. Petitioner shows this Supreme Court of the United States that his cause is identical to the cause

espoused in McKeithen v. LeBlanc, Supra, and that due process requires that he be afforded the opportunity to be heard on his defense of the action brought to close his case and claim on malpractice by exception on prescription.

Petitioner argues that the First Circuit Court of Appeals completely disregarded this argument by Mr. Vanner and denied the appeal. Petitioner argues that he has been denied due process of law as the law envisions the process and asks that this Supreme Court of the United States seize the opportunity to make a statement to Louisiana on behalf of Jake Vanner, Sr., and grant this writ application and order the appropriate legal remedy to put Mr. Vanner again in a position to be heard on the merits of his defense in the Louisiana court of proper jurisdiction.

Petitioner prays to this Honorable United States Supreme Court for a judgment in his favor and against all inferior courts who ruled in this case.

Petitioner prays for a judgment in accordance witht he law and Constitution of the United States.

Respectfully Submitted,
/s/ Jake Vanner, Sr.
JAKE VANNER, SR., In Proper Person
6162 Peyton Drive
Baton Rouge, Louisiana 70811
Telephone: (504) 357-0187

APPENDICES

APPENDIX A

The Supreme Court of the State of Louisiana

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VS. NO. 97-C-1567

JAKE VANNER

IN RE: Vanner, Jake; - Defendant(s): Applying for Reconsideration of this Court's Order dated September 26, 1997; Parish of East Baton Rouge, 19th Judicial District Court, Division "F", Number 403,636; to the Court of Appeal First Circuit Number CA 95 0754

November 7, 1997

Reconsideration denied. Judgment is res judicata

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J., - not on panel.

Supreme Court of Louisiana

_____
Deputy Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VS. NO. 97-C-1567

JAKE VANNER

IN RE: Vanner, Jake; - Defendant(s): Applying for Writ of Certiorari and/or Review; Parish of East Baton Rouge, 19th Judicial District Court, Division "F", Number 403,636; to the Court of Appeal First Circuit Number CA 95 0754

September 26, 1997

Denied.

PFC
WFM
HTL
CDK
BJJ
JPV
JTK

TRAYLOR, J. Not on panel.

Supreme Court of Louisiana
September 26, 1997

_____
Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 95 CA 0754

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VERSUS

JAKE VANNER

Judgment Rendered: December 15, 1995

* * * * * * * * * * *

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 403,636

Honorable Frank J. Saia, Judge

* * * * * * * * * * *

Jake Vanner
Baton Rouge, LA

In Proper Person
Appellant

T. MacDougall

Attorney for Appellee
Our Lady of the Lake
Hospital

Ronald A. Seale

Attorney for Appellee
Dr. Charlie Bridges

* * * * * * * * * * *

BEFORE: LeBLANC, WHIPPLE, AND FOGG, JJ.

FOGG, J.

In this medical malpractice case, Jake Vanner appeals from a judgment of the trial court sustaining the peremptory exception raising the objection of prescription filed by Our Lady of the Lake Hospital, Inc. (OLOL) and Dr. Charlie Bridges (hereinafter collectively referred to as "plaintiffs"). For the following reasons, we remand.

The plaintiffs filed suit against Vanner, alleging that Vanner filed a medical malpractice complaint against them with the Louisiana Patient's Compensation Fund. The plaintiffs alleged that they filed suit in order to file a peremptory exception raising the objection of prescription as to Vanner's medical malpractice complaint, as authorized under LSA-R.S. 40:1299.47 (B) (2) (a).[1] Along with their petition, the plaintiffs filed a peremptory exception raising the objection of prescription. According to the exception, Vanner filed his complaint with the Fund on September 3, 1993, and, based on medical records, the alleged act of malpractice occurred on or about February 2, 1989. In their exception, the plaintiffs alleged that under LSA-R.S. 9:5628,

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1. LSA-R.S. 40:1299.47 (B) (2) (a) states,

A health care provider, against whom a claim has been filed under the provisions of this Part, may raise any exception or defenses available pursuant to R.S. 9:5628 in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel.

Vanner had knowledge of sufficient facts of the alleged act of malpractice to begin the running of the one year prescriptive period, such that Vanner's complaint was prescribed. Attached to the exception was a memorandum, and appended to the exception and memorandum were exhibits. The exhibits attached were Vanner's malpractice complaint, his deposition, and medical records as well as a letter to Vanner's attorney from a urologist Vanner consulted.

The trial court set the exception for hearing on April 18, 1994. On April 13, 1994, Vanner filed a motion for continuance. According to the trial court's judgment, the matter came before the court on April 18, 1994, concerning the plaintiffs' exception of prescription and Vanner's motion for continuance. The judgment states that after considering the memoranda which were submitted, the oral argument by the parties, the law and the evidence, the court denied the motion for continuance, sustained the exception of prescription and dismissed the suit as well as the medical malpractice complaint. On appeal, Vanner contends the trial court erred in denying his motion for continuance and in sustaining the exception. We pretermit the first assignment of error, finding that the second assignment of error has merit.

If a plaintiff's claims are not prescribed on the face of the petition, the burden is on the party raising the objection of prescription

to prove the facts to support the objection. **Tranum v. Hebert**, 581 So.2d 1023 (La.App. 1st Cir.), writ denied, 584 So.2d 1169 (La. 1991). However, if on the face of the petition it appears that prescription has run, the burden shifts to the plaintiff to prove a suspension or interruption of the prescriptive period. **Younger v. Marshall Industries, Inc.**, 618 So.2d 866 (La. 1993). At the trial of a peremptory exception, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." LSA-C.C.P. art. 931. Generally, in the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and all allegations thereof are accepted as true. **State ex rel. Guste v. Thompson**, 532 So.2d 524 (La.App. 1st Cit. 1988). According to the judgment and minute entry for April 18, 1994, evidence was introduced at the hearing on the exception of prescription.[2] However, the record contains no evidence and does not indicate what evidence was introduced at the hearing, as there was no transcript of the hearing.[3] Pursuant to LSA-C.C.P. art. 2164, an

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2. The minute entry for April 18, 1994, states, in pertinent part, "This matter came on for hearing on Exception of Prescription . . . . On the Exception of Prescription documentary evidence was introduced . . . ."

3. While the record contains a document following the memorandum in support of the exception which bears an unsigned file stamp dated April 18, 1994, this document is insufficient to show that the attachments

appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. LSA-C.C.P arts. 2127 and 2128; Official Revision Comment (d) for LSA-C.C.P. art. 2127. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. **Tranum v. Hebert**, 581 So.2d at 1026. The record before us contains a memorandum in support of the peremptory exception which was supplemented with exhibits. We may not consider exhibits filed in the record which were not filed in evidence unless authorized by law to do so, such as under LSA-C.C.P. arts. 966

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to the memorandum were introduced into evidence at the hearing on the exception. This untitled document states in its caption, "IN ACCORDANCE WITH LOCAL RULE VIII, ADDRESSES AND TELEPHONE NUMBERS OF ALL COUNSEL AND/OR PARTIES TO BE NOTIFIED" and simply bears Vanner's name, address and telephone number, and the name, address and telephone number of counsel for Dr. Bridges and OLOL. Immediately following the document is a document setting forth a certificate of service as to the memorandum in support of the exception dated February 24, 1994. None of the exhibits which follow this document are file-stamped.

Additionally, at the beginning of the record, the clerk's office inserted a page entitled, "CIVIL EVIDENCE LIST" which states, "NO EXHIBITS HAVE BEEN FILED WITH CLERK OF COURT AS OF MARCH 30, 1995. NOTE: THE PCF NO. 93-352 MALPRACTICE COMPLAINT WAS NOT FILED WITH CLERK OF COURT OR THE JUDGE'S OFFICE."

and 967. **Tranum v. Hebert**, 581 So.2d at 1027; **State ex rel. Guste v. Thompson**, 532 So.2d at 527 n.2. We are not authorized to consider as part of the record exhibits attached to a peremptory exception or a memorandum in support of a peremptory exception, and as this memorandum and exhibits were not filed in evidence, they are not part of the record on appeal.

Under LSA-R.S. 40:1299.47 (B) (2) (a), the plaintiffs had the burden of proving that Vanner's claim was prescribed. Because we are not authorized by law to consider the plaintiffs' attachments to their memorandum in support of their exception and because the record before us at this time contains no evidence submitted by the plaintiffs to support their exception, we find that the plaintiffs failed to meet their burden of proof.

However, both the minute entry and the judgment state that evidence was introduced at the hearing on the exception. Ordinarily, the inadequacy of a record is imputable to the appellant. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. However, the inadequacy of an appellate record for which an appellant is responsible cannot operate to the detriment of an appellee. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. Thus, if evidence was introduced at the hearing on the exception and the appellant failed to transmit a complete record to this

court, this inadequacy cannot be used to reverse the judgment in favor of the appellees. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. Conversely, if evidence was not introduced at the hearing on the exception, then it will be necessary to reverse the judgment rendered in favor of the appellees due to their failure to meet their burden of proof that Vanner's claim is prescribed. **State ex rel. Guste v. Thompson**, 532 So.2d at 527.

In the interest of justice, we will remand this case for an evidentiary hearing on the issue of whether the evidence was introduced and for supplementation of the record with the evidence, if properly introduced. LSA-C.C.P. arts. 2132 and 2164. See **State ex rel. Guste v. Thompson**, 532 So.2d at 527-528.

DECREE

For the foregoing reasons, the following orders are entered herein:

(1) this action is remanded to the district court which shall hold an evidentiary hearing to determine whether evidence was introduced at the hearing on the peremptory exception raising the objection of prescription;

(2) if the district court finds as a fact that evidence was properly introduced, the record shall be supplemented with all pertinent evidence

introduced at the hearing and returned to this court, reserving to the appellant the right to assign error on this factual determination;

(3) if the district court finds as a fact that no evidence was introduced, it shall vacate its prior judgment, reserving to the appellees the right to seek a supervisory writ to this court for our review of the factual determination that evidence was not introduced, and, in the absence of such, this appeal will be mooted and Our Lady of the Lake Hospital, Inc. (OLOL) and Dr. Charlie Bridges are cast for costs of this appeal; and

(4) this court shall retain appellate jurisdiction over this case until it is finally decided or this appeal becomes moot.[4]

Since we have retained appellate jurisdiction, we do not at this time assess costs except as set forth above in paragraph (3).

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 95/CA/0754

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VERSUS

PARISH OF
EAST BATON
ROUGE
JAKE VANNER

On application for Rehearing.

Rehearing DENIED.

/s/ Daniel W. LeBlanc

/s/ Vanessa Guidry-Whipple

/s/ Kenneth J. Fogg

Filed MAR 05, 1996

/s/ Stanley P. Lemoine
Clerk

APPENDIX C

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

JAKE VANNER	NUMBER 403,636
VERSUS	DIVISION "F"
OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL	**JUDGMENT**

This matter came before this Honorable Court on April 18, 1994, for a determination of the defendant's, Jake Vanner, Motion for Continuance, and for a determination of the plaintiffs' Exception of Prescription.

Present were Michelle O. Lorio, for Our Lady of the Lake Hospital, Inc., Ronald A. Seale, for Dr. Charlie Bridges, and Jake Vanner in proper person.

Considering the memoranda submitted by counsel, oral argument presented at the hearing, the law and the evidence, the Judge having concluded the following:

The Motion for Continuance filed on behalf of Jake Vaneer is hereby denied;

The exception of Prescription filed on behalf of Dr. Charlie

Bridges and Our Lady of the Lake Hospital, Inc. Is hereby granted.

That the above entitled and numbered action, and the Medical Malpractice Complaint, entitled Jake Vanner, Sr. v. Our Lady of the Lake Hospital, Inc., et al, PCF No. 93-962, are hereby dismissed, with prejudice, and at plaintiff's cost.

JUDGMENT READ, RENDERED AND SIGNED, in Chambers at Baton Rouge, Louisiana, this 3rd day of May, 1994.

/s/ Frank J. Saia
Judge, 19th Judicial District Court

FILED
May 3, 1994
Dy. Clerk of Court

APPENDIX D

JAKE VANNER

VERSUS

DR. CHARLES BRIDGES AND OUR LADY OF THE LAKE HOSPITAL

CLERK OF THE DISTRICT COURT

19TH JUDICIAL DISTRICT COURT

EAST BATON ROUGE PARISH

STATE OF LOUISIANA

DOCKET NO: 403,636

DIVISION: "F"

MOTION FOR A CONTINUANCE IN HEARING REGARDING DEFENDANTS' MOTION FOR A PEREMPTORY EXCEPTION OF PRESCRIPTION TO THE MEDICAL COMPLAINT:

NOW INTO COURT COMES, JAKE VANNER, IN PROPER PERSON, AND WHO RESPECTFULLY REPRESENTS TO THIS HONORABLE COURT, THE FOLLOWING, TO-WIT:

1.

Mover shows that this Honorable Court has set a hearing date of April 18, 1994, at 9:30 a.m., to hear arguments regarding defendants motion for a peremptory exception of mover's medical malpractice complaint. Mover desires a continuance for the reasons stated herein:

2.

Mover shows that the record will reflect that on its face, mover's malpractice complaint may appear to have prescribed; however, mover is preparing to show this Honorable Court that not

only has mover's medical malpractice complaint not prescribed under the laws of this state, but that prescription did, in fact, cease to run (if it ever properly started). Also, that mover was misled by professionals regarding his condition including Dr. Charles Bridges. Mover is poreparing to show this Honorable Court case law offered by the defendants in this case, when properly considered with the evidence which will be offered by mover, will support mover's case. Mover will argue two theories of law to support evidence in his claim that prescription has not run in his case.

1) The theory and doctrine of contra non valentem agere milla currit praescripto; 2) the theory of law involving the misleading of mover by Dr. Charles Bridges, and others, during this time concerning his condition and the viability of his possible case.

3.

Additionally, mover shows this Honorable Court that, in order to properly prosecute his cause before this Honorable Court and defeat the motion of defendants in this case, he will need the testimony of several witnesses, including, but not limited to, the following people:

1. Dr. Neil Baum (Neurologist)

Dr. Baum will be able to testify to the various levels of discovery of medical affects which the papaverine study by Dr. Charles

Bridges had on my body to produce any given medical condition that I suffer from as a result of the study and the time span that would elapse before it could be determined credibly when a certain problem developed.

2 Dr. Phillip Brantley, Ph.D. (Psychologist)

Dr. Brantley can testify as to my mental state during this period which will support my contention that the doctrine of contra no valentem agere milla currit praescripto applies in this case, and that I could not have possessed the state necessary to deal with the kind of knowledge needed to invoke the running of prescription at the time which defendants argue prescription started in this claim. Dr. Brantley's testimony can also corroborate other testimony that I will argue that the attorneys I consulted led me to think that nothing was really there to pursue, and when you add my mental state to these occurrences, one can see that I was totally misled. Dr. Brantley can testify as to why he questioned the reasons for referring me to him.

3. Mrs. Patricia Vanner (my wife)

My wife will be able to testify about what I was actually going through at the time and she will be able to corroborate other testimony about the impression I got from my treatment and trips to Dr. Charles Bridges after the papapavarine study and how that confused me

concerning my condition.

Mover will also call other witnesses which are not available at this time for the hearing. But given approximately sixty more days to prepare and possibly bring in an attorney, I will be able to be ready to prosecute my case and defend against defendants' arguments concerning the status of prescription of my claim.

Mover prays for judgment from this Honorable Court to, first, continue this hearing. Secondly, mover prays to this Honorable Court to set a new hearing date, desirably, no less than sixty days from the date this Honorable Court acts upon this motion.

Mover prays for judgment from this Honorable Court, and for judgment commensurate with justice and fairness in this case in that mover sees no compelling interest on the part of defendants to have this matter adjudicated without mover having first a full due process of law hearing which would necessarily involve the proper preparation by mover.

Mover prays for judgment in accordance with law.

By: /s/ Jake Vanner, Sr.
6162 Peyton Drive
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Telephone: (504) 357-0187

APPENDIX E

AFFIDAVIT

I certify and affirm that the allegations contained in this document are true and correct to the best of my knowledge and belief, and that I affirm these allegations under penalty of perjury.

/s/ Jake Vanner, Sr.

SIGNED AND SWORN TO BEFORE ME, a Notary Public, on this the 13th day of April, 1994, in Baton Rouge, Louisiana.

/s/ Mark W. Fry

Notary Public

My Commission Expires at Death

Supreme Court, U.S.
F I L E D
JUN 22 1998
CLERK

No. 97-1931

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JAKE VANNER, SR.
PETITIONER

VERSUS

OUR LADY OF THE LAKE HOSPITAL, AND CHARLIE BRIDGES, M.D.
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 22, 1998

Franklin Press, Inc. — Baton Rouge, Louisiana

QUESTION PRESENTED FOR REVIEW

1. Did petitioner receive due process of law pursuant to U.S.C.A. Const. Amend. 14, Section 1 in the state courts of Louisiana where petitioner's claim was considered on the merits by the intermediate appellate court of Louisiana and a writ application thereafter filed by petitioner was denied by the Supreme Court of Louisiana?

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Jake Vanner, Sr.
Our Lady of the Lake Hospital, Inc.
Charlie Bridges, M.D.

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97-1567 (La. 11/7/97), 703 So.2d 1257
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STATUTES

U. S. Constitution, Amendment 14, Section 1 1

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L.S.A.-R.S. 40:1299.47 (B) (2)(a) 2

No. 97-1931

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

JAKE VANNER, SR.
PETITIONER

VERSUS

OUR LADY OF THE LAKE HOSPITAL, AND CHARLIE BRIDGES, M.D.
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

The jurisdiction of this Court is 28 U.S.C. Section 1257.

STATUTES INVOLVED

I. U.S. Constitution, Amendment 14, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

II. Louisiana Revised Statutes 9:5628:

Actions for medical malpractice

"A. No action for damages for injury or death against any physician, chiropractor, nurse, licensed midwife practitioner, dentist, psychologist, optometrist, hospital duly licensed under the laws of this state, or community blood center or tissue bank as defined in R.S. 40:1299.41 (A), whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims shall be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

B. The provisions of this Section shall apply to all persons whether or not infirm or under disability of any kind and including minors and interdicts."

III. Louisiana Revised Statutes 40:1299.47 (B) (2)(a):

Medical review panel

"A health care provider, against whom a claim has been filed under the provisions of this Part, may raise any exception or defenses available pursuant to R.S. 9:5628 in a court of competent jurisdiction and proper venue at any

time without need for completion of the review process by the medical review panel."

STATEMENT OF THE CASE

This is a medical malpractice claim asserted by Jake Vanner, Sr. against Dr. Charlie Bridges, a Baton Rouge urologist, and Our Lady of the Lake Hospital, Inc., a nonprofit hospital located in Baton Rouge. Mr. Vanner filed his complaint with the Louisiana Patient's Compensation Fund on September 3, 1993. As the matter was untimely brought, the malpractice defendants responded in Louisiana state district court raising the preemptory exception of prescription as authorized by L.S.A.-R.S. 40:1299.47 (B) (2)(a).

The district court scheduled a hearing on the challenge raised by the defendants pursuant to notice given to all parties. Shortly before the hearing, Mr. Vanner moved for a continuance which was denied. Thereafter, the Court considered the exception of prescription. Determining that the matter was, in fact, untimely brought, the exception was granted and a judgment was signed dismissing the case, with prejudice, on May 3, 1994.

The Louisiana First Circuit Court of Appeal denied a writ application on June 2, 1994. Mr. Vanner then sought an appeal.

On appeal, Mr. Vanner contended the trial court erred in denying his motion for continuance and in sustaining the malpractice defendants' exception of prescription. On December 15, 1995, the Court of Appeal remanded the case to the district court, ordering the district judge to determine whether evidence was introduced at the hearing on the preemptory

exception which raised the objection of prescription. Further, the Court of Appeal decreed that if the district court found as a fact that evidence was properly introduced, then the Court ordered the record supplemented with all pertinent evidence introduced at the hearing and returned to the Court of Appeal for further consideration. *Our Lady of the Lake Hosp. v. Vanner,* 95 0754 (La. App., 1 Cir. 12/15/95), 669 So.2d 463 (La. App. 1 Cir., Dec. 15, 1995) (NO. 95 CA 0754). The Court of Appeal further denied an application for rehearing as filed by the malpractice defendants on March 5, 1996.

Pursuant to the order of the Court of Appeal, the district judge then conducted an evidentiary hearing on October 11, 1996. Again, all parties were notified and present. The district court found as a matter of fact that evidence was introduced at the original hearing on the issue of prescription. The record was then supplemented and an order with written reasons was signed by the district judge. The case then returned to the Louisiana First Circuit Court of Appeal for review on the merits of all issues as raised by petitioner, Jake Vanner.

On March 27, 1997, the Louisiana First Circuit Court of Appeal rendered judgment with written reasons pursuant to a review of this case on all issues sought to be raised by petitioner, Jake Vanner. *Our Lady of the Lake Hosp. v. Vanner,* 95 0754 (La. App., 1 Cir. 3/27/97), 692 So.2d 40 (La. App., 1 Cir., Mar 27, 1997) (NO. 95 CA 0754). The Court of Appeal affirmed the dismissal of this action by the trial judge finding the judge to be correct in his denial of petitioner's request for a continuance, and, more importantly, determining the action to have been untimely brought. The Court denied petitioner's application for rehearing on May 8, 1997.

Petition for writ of certiorari was thereafter filed by petitioner in the Supreme Court of the State of Louisiana which was denied on September 26, 1997. *Our Lady of the Lake Hosp. v. Vanner,* 97-1567 (La. 9/26/97), 701 So.2d 992, Reconsideration Denied, (La., Sep 26, 1997) (NO. 97-C-1567). An application for reconsideration was thereafter denied on November 7, 1997. *Our Lady of the Lake Hosp. v. Vanner,* 97-1567 (La. 11/7/97), 703 So.2d 1257 (La., Nov 07, 1997) (NO. 97-C-1567). Petitioner thereafter filed the present petition for certiorari in the Supreme Court of the United States.

SUMMARY OF ARGUMENT

A review of the record below clearly indicates that the petitioner has not been denied due process of law. Respondents, Our Lady of the Lake Hospital, Inc. and Charlie Bridges, M.D. file this opposition to petitioner's application for certiorari to make the Court aware of the fact that all issues sought to be raised by petitioner were in fact reviewed, on the merits, by the trial judge in the Parish of East Baton Rouge as well as by the Louisiana First Circuit Court of Appeal. Included in the appendix are the written reasons for judgment of the Louisiana appellate court. This opinion was omitted from petitioner's writ application and the primary purpose of this opposition is to call this Court's attention to the fact of appellate review of the merits of Vanner's claim, a point not made in the application for supervisory writs.

ARGUMENT

This case began as a medical malpractice action in Baton Rouge against two defendants, a hospital in Baton Rouge,

Louisiana, and a urologist who practices in Baton Rouge. Brought by Jake Vanner, in proper person, the claim originally sought to raise allegations of substandard care against the hospital and the doctor.

When a request for a medical review panel was originally made by Mr. Vanner, the defendants properly responded that the matter was untimely brought and was, in fact, prescribed pursuant to L.S.A.-R.S. 40:1299.47 (B) (2) (a).

At the hearing on the issue of prescription, the trial judge agreed with the defendants and dismissed the case as untimely. At the time of that hearing, the trial judge also declined to grant a continuance as requested by Mr. Vanner to postpone that hearing.

The case thereafter made its way to the Louisiana First Circuit Court of Appeal which initially indicated a determination could not be made as to whether evidence was introduced at the district court hearing. Subsequent to a remand to the district judge, a second hearing was held at the state district court level to supplement the record that originally had been transmitted to the Court of Appeal. The case then returned to the Louisiana First Circuit Court of Appeal.

The Court of Appeal considered the case at oral argument before a three-judge panel and thereafter rendered a written opinion which affirmed the trial judge's determination that the case was, in fact, untimely brought and therefore prescribed.

Further, the Court of Appeal agreed that it was within the sound discretion of the trial judge to deny petitioner's motion for a continuance of the earlier hearing at the district court level.

Following the publication of the Court of Appeal opinion, Vanner applied for reconsideration which was denied. Thereafter, Mr. Vanner sought review by the Supreme Court of Louisiana which was likewise denied.

Our Lady of the Lake Hospital, Inc. and Charlie Bridges, M.D., under the admonition of Rule 15(2) of the Supreme Court of the United States, file this opposition to point out to the Court those perceived misstatements made in the petition for review. Primarily, petitioner has omitted, in its entirety, any reference to the terminal opinion of the Louisiana First Circuit Court of Appeal which considered, on the merits, all issues sought to be raised by Mr. Vanner in this Court as well as the Supreme Court of the State of Louisiana. Specifically, the Louisiana intermediate court addressed and thereafter published an opinion on the issues of the timeliness of the medical malpractice action and the perceived abuse of discretion of the trial judge in denying his motion for a continuance. On both counts, the three-judge appellate court affirmed the trial judge. Thereafter, upon writ application, the Louisiana Supreme Court declined to exercise its jurisdiction.

Respondents would be remiss if this crucial step in the appellate process were not brought to the attention of this Court. Based upon the complete review of this matter below, there is no basis for a claim that Mr. Vanner has been denied due process of law. Contrary to Mr. Vanner's assertions, he has, in fact, received a hearing on the merits of his argument. It is for these reasons that respondents assert that this case does not present a proper basis for exercise of this Court's supervisory jurisdiction.

CONCLUSION

Having received complete review of his arguments by the Court of Appeal in Louisiana, and consideration upon writ of certiorari by the Supreme Court of Louisiana, and failing completely to fall within any of the considerations as to why this Court should review the matter on certiorari, the petitioner's application should be denied.

Respectfully Submitted,

SEALE, SMITH, ZUBER & BARNETTE

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June 22, 1998

APPENDIX

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APPENDIX A

NINETEENTH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

JAKE VANNER	**NUMBER 403,636**
VERSUS	**DIVISION "F"**
OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL	**JUDGMENT**

This matter came before this Honorable Court on April 18, 1994, for a determination of the defendant's, Jake Vanner, Motion for Continuance, and for a determination of the plaintiffs' Exception of Prescription.

Present were Michelle O. Lorio, for Our Lady of the Lake Hospital, Inc., Ronald A. Seale, for Dr. Charlie Bridges, and Jake Vanner in proper person.

Considering the memoranda submitted by counsel, oral argument presented at the hearing, the law and the evidence, the Judge having concluded the following:

The Motion for Continuance filed on behalf of Jake Vanner is hereby denied;

The Exception of Prescription filed on behalf of Dr. Charlie Bridges and Our Lady of the Lake Hospital, Inc. is hereby granted.

That the above entitled and numbered action, and the Medical Malpractice Complaint, entitled Jake Vanner, Sr. v.

Our Lady of the Lake Hospital, Inc., et al, PCF No. 93-962, are hereby dismissed, with prejudice, and at plaintiff's cost.

JUDGMENT READ, RENDERED AND SIGNED, in Chambers at Baton Rouge, Louisiana, this 3rd day of May, 1994.

s/ Frank J. Saia
JUDGE, 19TH JUDICIAL DISTRICT COURT

By Attorneys:

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& FRITCHIE, L.L.P.

s/ Michelle O. Lorio
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ATTORNEY FOR DR. CHARLIE BRIDGES

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number : 95/CA/0754 DATE: Dec. 15, 1995

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VERSUS

JAKE VANNER

TO:

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Baton Rouge, LA 70811

T. MacDougall Womack
P. O. Box 2471
Baton Rouge, LA 70821

Ronald A. Seale
8550 United Plaza Boulevard
Two United Plaza, Suite 200
Baton Rouge, LA 70809

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

s/ Peggy F. Landry
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 95 CA 0754

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL
VERSUS
JAKE VANNER

Judgment Rendered: December 15, 1995

* * * * *

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 403,636

Honorable Frank J. Saia, Judge

* * * * *

Jake Vanner Baton Rouge, LA	In Proper Person Appellant
T. MacDougall Baton Rouge, LA	Attorney for Appellee Our Lady of the Lake Hospital
Ronald A. Seale Baton Rouge, LA	Attorney for Appellee Dr. Charlie Bridges

* * * * *

BEFORE: LEBLANC, WHIPPLE, AND FOGG, JJ.

FOGG, J.

In this medical malpractice case, Jake Vanner appeals from a judgment of the trial court sustaining the peremptory exception raising the objection of prescription filed by Our Lady of the Lake Hospital, Inc. (OLOL) and Dr. Charlie Bridges (hereinafter collectively referred to as "plaintiffs"). For the following reasons, we remand.

The plaintiffs filed suit against Vanner, alleging that Vanner filed a medical malpractice complaint against them with the Louisiana Patient's Compensation Fund. The plaintiffs alleged that they filed suit in order to file a peremptory exception raising the objection of prescription as to Vanner's medical malpractice complaint, as authorized under LSA-R.S. 40:1299.47(B)(2)(a).[1] Along with their petition, the plaintiffs filed a peremptory exception raising the objection of prescription. According to the exception, Vanner filed his complaint with the Fund on September 3, 1993, and, based on medical records, the alleged act of malpractice occurred on or about February 2, 1989. In their exception, the plaintiffs alleged that under LSA-R.S. 9:5628, Vanner had knowledge of sufficient facts of the alleged act of malpractice to begin the running of the one year prescriptive period, such that Vanner's complaint was prescribed. Attached to the exception was a memorandum, and appended to the exception and memorandum were exhibits. The exhibits attached were Vanner's malpractice

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[1]LSA-R.S. 40:1299.47 (B) (2) (a) states,

> A health care provider, against whom a claim has been filed under the provisions of this Part, may raise any exception or defenses available pursuant to R.S. 9:5628 in a court of competent jurisdiction and proper venue at any time without need for completion of the review process by the medical review panel.

complaint, his deposition, and medical records as well as a letter to Vanner's attorney from a urologist Vanner consulted.

The trial court set the exception for hearing on April 18, 1994. On April 13, 1994, Vanner filed a motion for continuance. According to the trial court's judgment, the matter came before the court on April 18, 1994, concerning the plaintiffs' exception of prescription and Vanner's motion for continuance. The judgment states that after considering the memoranda which were submitted, the oral argument by the parties, the law and the evidence, the court denied the motion for continuance, sustained the exception of prescription and dismissed the suit as well as the medical malpractice complaint. On appeal, Vanner contends the trial court erred in denying his motion for continuance and in sustaining the exception. We pretermit the first assignment of error, finding that the second assignment of error has merit.

If a plaintiff's claims are not prescribed on the face of the petition, the burden is on the party raising the objection of prescription to prove the facts to support the objection. **Tranum v. Hebert,** 581 So.2d 1023 (La.App, 1st Cir.), writ denied, 584 So.2d 1169 (La.1991). However, if on the face of the petition it appears that prescription has run, the burden shifts to the plaintiff to prove a suspension or interruption of the prescriptive period. **Younger v. Marshall Industries, Inc.**, 618 So.2d 866 (La.1993). At the trial of a peremptory exception, "evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." LSA-C.C.P. art. 931. Generally, in the absence of evidence, the objection of prescription must be decided upon the facts alleged in the petition, and all allegations thereof are accepted as true. **State ex**

rel. Guste v. Thompson, 532 So.2d 524 (La. App. 1st Cir.1988). According to the judgment and minute entry for April 18, 1994, evidence was introduced at the hearing on the exception of prescription.[2] However, the record contains no evidence and does not indicate what evidence was introduced at the hearing, as there was no transcript of the hearing.[3] Pursuant to LSA-C.C.P. art. 2164, an appellate court must render its judgment upon the record on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. LSA-C.C.P. arts. 2127 and 2128; Official Revision Comment (d) for LSA-C.C.P. art. 2127. An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence. **Tranum v. Hebert**, 581 So.2d at 1026. The record before us contains a memorandum in support of the peremptory exception which was supplemented with exhibits. We may not consider exhibits filed in the record which were not filed in evidence unless authorized by law to do so, such as under LSA-C.C.P. arts. 966 and 967, **Tranum v. Hebert**, 581 So.2d at 1027; **State ex rel. Guste v. Thompson**, 532 So. 2d at 527 n.2. We are not authorized to

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[2] The minute entry for April 18, 1994, states, in pertinent part, "This matter came on for hearing on Exception of Prescription. . . . On the Exception of Prescription documentary evidence was introduced . . . ."

[3] While the record contains a document following the memorandum in support of the exception which bears an unsigned file stamp dated April 18, 1994, this document is insufficient to show that the attachments to the memorandum were introduced into evidence at the hearing on the exception. This untitled document states in its caption, "IN ACCORDANCE WITH LOCAL RULE VIII, ADDRESSES AND TELEPHONE NUMBERS OF ALL COUNSEL AND/OR PARTIES TO BE NOTIFIED" and simply bears Vanner's name, address and telephone number, and the

consider as part of the record exhibits attached to a peremptory exception or a memorandum in support of a peremptory exception, and as this memorandum and exhibits were not filed in evidence, they are not part of the record on appeal.

Under LSA-R. S. 40:1299. 47 (B) (2) (a), the plaintiffs had the burden of proving that Vanner's claim was prescribed. Because we are not authorized by law to consider the plaintiffs' attachments to their memorandum in support of their exception and because the record before us at this time contains no evidence submitted by the plaintiffs to support their exception, we find that the plaintiffs failed to meet their burden of proof.

However, both the minute entry and the judgment state that evidence was introduced at the hearing on the exception. Ordinarily, the inadequacy of a record is imputable to the appellant. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. However, the inadequacy of an appellate record for which an appellant is responsible cannot operate to the detriment of an appellee. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. Thus, if evidence was introduced at the hearing on the exception and the appellant failed to transmit a com-

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name, address and telephone number of counsel for Dr. Bridges and OLOL. Immediately following the document is a document setting forth a certificate of service as to the memorandum in support of the exception dated February 24, 1994. None of the exhibits which follow this document are file-stamped,

Additionally at the beginning of the record the clerk's office inserted a page entitled, "CIVIL EVIDENCE LIST" which states, "NO EXHIBITS HAVE BEEN FILED WITH CLERK OF COURT AS OF MARCH 30, 1995. NOTE: THE PCF NO. 93-352 MALPRACTICE COMPLAINT WAS NOT FILED WITH CLERK OF COURT OR THE JUDGE'S OFFICE."

plete record to this court, this inadequacy cannot be used to reverse the judgment in favor of the appellees. **State ex rel. Guste v. Thompson**, 532 So.2d at 527. Conversely, if evidence was not introduced at the hearing on the exception, then it will be necessary to reverse the judgment rendered in favor of the appellees due to their failure to meet their burden of proof that Vanner's claim is prescribed. **State ex rel. Guste v. Thompson**, 532 So.2d at 527.

In the interest of justice, we will remand this case for an evidentiary hearing on the issue of whether the evidence was introduced and for supplementation of the record with the evidence, if properly introduced. LSA-C.C.P. arts. 2132 and 2164. See **State ex rel. Guste v. Thompson**, 532 So.2d at 527-528.

DECREE

For the foregoing reasons, the following orders are entered herein:

(1) this action is remanded to the district court which shall hold an evidentiary hearing to determine whether evidence was introduced at the hearing on the peremptory exception raising the objection of prescription;

(2) if the district court finds as a fact that evidence was properly introduced, the record shall be supplemented with all pertinent evidence introduced at the hearing and returned to this court, reserving to the appellant the right to assign error on this factual determination;

(3) if the district court finds as a fact that no evidence was introduced, it shall vacate its prior judgment, reserving to the appellees the right to seek a supervisory writ to this court for

our review of the factual determination that evidence was not introduced, and, in the absence of such, this appeal will be mooted and Our Lady of the Lake Hospital, Inc. (OLOL) and Dr. Charlie Bridges are cast for costs of this appeal; and

(4) this court shall retain appellate jurisdiction over this case until it is finally decided or this appeal becomes moot.[4]

REMANDED.

[4] Since we have retained appellate jurisdiction, we do not at this time assess costs except as set forth above in paragraph (3).

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number : 95/CA/0754 DATE: Mar. 5, 1996

OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL

VERSUS

JAKE VANNER

CERTIFICATE OF MAILING

I hereby certify that a copy of the attached was mailed to all counsel of record, and all parties not represented by counsel this date as listed below.

s/ Karen West
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL,
FIRST CIRCUIT

TO:

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6261 Peyton Drive
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COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 95/CA/0754

OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL

—VERSUS—

Parish of East Baton Rouge

JAKE VANNER

On application for Rehearing.

Rehearing DENIED

s/ Daniel W. LeBlanc

s/ Vanessa Guidry-Whipple

s/ Kenneth J. Fogg

Filed Mar 5, 1996

s/ STANLEY P. LEMOINE, Clerk

APPENDIX C

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

CIVIL MATTER
NUMBER 95-CA-0754

OUR LADY OF THE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL
Appellees

VERSUS

JAKE VANNER

Appellant

RULING ON DETERMINATION AS TO WHETHER OR NOT EVIDENCE WAS PROPERLY INTRODUCED

Present in Court were Mr. Orscini Beard, counsel for defendant-appellant, Jake Vanner. Present also in Court were Ronnie Seale, counsel for plaintiff-appellee, Dr. Charlie Bridges and T. MacDougall Womack, counsel for plaintiff-appellee, Our Lady of the Lake Hospital, Inc.

This matter was back before the Court pursuant to the decree of the Court of Appeal for the First Circuit, rendered in connection with a decision issued by the Court of Appeal

dated December 15, 1995, Docket No. 95-CA-0754, in the matter entitled, "Our Lady of the Lake Hospital, Dr. Charlie Bridges, et al vs. Jake Vanner."

In the decree section of the opinion of December 15, 1995, of the First Circuit mentioned above, this action was remanded to the District Court to hold an evidentiary hearing to determine whether evidence was introduced at the hearing on the peremptory exception raising the objection of prescription. If the Court found as a fact that evidence was properly introduced, the record was to be supplemented with all pertinent evidence introduced at the hearing and returned to the Court.

This Court took the matter up in open court this morning and after argument and after the introduction of the minute entry for the original hearing on the peremptory exception, and after considering the transcript of the hearing on the peremptory exception, and after a review of the law;

The Court now finds that evidence was introduced at the hearing on the peremptory exception raising the objection of prescription, and the Court allowed to be filed into evidence plaintiff's exhibit numbers 3 through 7 in order to properly supplement the record on appeal. (**Plaintiff's Exhibit No. 3** is the medical malpractice claim filed by Mr. Vanner; **Plaintiff's Exhibit No. 4** is a letter from Dr. Philip J. Brantley, Clinical Psychologist, to Dr. Charlie Bridges; **Plaintiff's Exhibit No. 5** is an intake questionaire found in the records of Our Lady of the Lake Hospital, Inc. and filled out, in part, by Mr. Jake Vanner; **Plaintiff's Exhibit No. 6** is a letter from Dr. Neal Baum, a urologist in New Orleans, to Mr. Allen Swartsenburger, attorney at law; **Plaintiff's Exhibit No. 7** is the transcript from the deposition of Mr. Jake Vanner)

Considering the fact that the Court of Appeal for the First Circuit retained jurisdiction over this case, the matter will now be sent back up to the First Circuit reserving the plaintiff-appellant's right to assigned error on this factual determination, all as provided in the decree of the First Circuit in its opinion dated December 15, 1995.

This ruling is made in open court on the 11th day of October, 1996, and signed in Chambers at Baton Rouge, Louisiana, this 24th day of October, 1996.

s/ Frank J. Saia
JUDGE, NINETEENTH JUDICIAL DISTRICT COURT

APPENDIX D

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

Post Office Box 4408

Baton Rouge, Louisiana 70821-4408

Docket Number : 95/CA/0754 DATE: Mar. 27, 1997

OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL

VERSUS

JAKE VANNER

TO:

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Baton Rouge, LA 70809

NOTICE OF JUDGMENT

You are hereby served with a copy of the opinion in the above entitled case.

Your attention is invited to Rule 2-18 (Rehearing) of the Uniform Rules of the Courts of Appeals, effective July 1, 1982.

I hereby certify that this opinion and notice of judgment were mailed to the trial judge, the clerk of the trial court, all appeal counsel of record, and all parties not represented by counsel this date.

s/ Karen West
STANLEY P. LEMOINE, CLERK
COURT OF APPEAL, FIRST CIRCUIT

AMENDED

TIME DELAY FOR REHEARING, C.C.P. ART. 2166; C.Cr.P. ART. 922; Act No. 451, EFFECTIVE AUGUST 30, 1983.

FEE FOR REHEARING, R.S. 13:352, AS AMENDED, EFFECTIVE AUGUST 30, 1986.

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 95 CA 0754

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VERSUS

JAKE VANNER

Judgment Rendered: March 27, 1997

* * * * *

Appealed from the
Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 403,636

Honorable Frank J. Saia, Judge

* * * * *

Ronald A. Seale Baton Rouge, LA	Attorney for Plaintiff—Appellee Dr. Charles Bridges
T, MacDougall Womack Baton Rouge, LA	Attorney for Plaintiff—Appellee Our Lady of the Lake Hospital
Orscini L. Beard Baton Rouge, LA	Attorney for Defendant—Appellant Jake Vanner

* * * * *

BEFORE: LOTTINGER, C.J., FOIL, AND FOGG, JJ.

FOGG, J.

The trial court dismissed this medical malpractice suit pursuant to an exception of prescription brought by Our Lady of the Lake Hospital, Inc. (OLOL) and Dr. Charlie Bridges; Jake Vanner appealed that judgment. For the following reasons, we affirm,

The facts and procedural posture of the case are set forth in **Our Lady of the Lake Hosp. v. Vanner**, 95-0754, p.2 (La.App. 1 Cir. 12/15/95); 669 So. 2d 463, 464, as follows:

> The plaintiffs filed suit against Vanner, alleging that Vanner filed a medical malpractice complaint against them with the Louisiana Patient's Compensation Fund. The plaintiffs alleged that they filed suit in order to file a peremptory exception raising the objection of prescription as to Vanner's medical malpractice complaint, as authorized under LSA-R.S. 40:1299.47(B)(2)(a). Along with their petition, the plaintiffs filed a peremptory exception raising the objection of prescription. According to the exception, Vanner filed his complaint with the Fund on September 3, 1993, and, based on medical records, the alleged act of malpractice occurred on or about February 2, 1989. In their exception, the plaintiffs alleged that under LSA-R.S. 9:5628, Vanner had knowledge of sufficient facts of the alleged act of malpractice to begin the running of the one year prescriptive period, such that Vanner's complaint was prescribed. Attached to the exception was a memorandum, and appended to the exception and memorandum were exhibits. The exhibits attached were Vanner's malpractice complaint,

> his deposition, and medical records as well as a letter to Vanner's attorney from a urologist Vanner consulted.
>
> The trial court set the exception for hearing on April 18, 1994. On April 13, 1994, Vanner filed a motion for continuance. According to the trial court's judgment, the matter came before the court on April 18, 1994, concerning the plaintiffs' exception of prescription and Vanner's motion for continuance. The judgment states that after considering the memoranda which were submitted, the oral argument by the parties, the law and the evidence, the court denied the motion for continuance, sustained the exception of prescription and dismissed the suit as well as the medical malpractice complaint. (Footnote omitted)

When we initially reviewed this case, we could not determine, from the record on appeal, whether certain exhibits relied on by OLOL and Dr. Bridges were introduced into evidence. Therefore, in the interest of justice, we remanded the case for an evidentiary hearing on that issue. The district court has, after hearing the matter, determined that the exhibits were introduced at the trial of the exception. Therefore, we will now address the issues raised by Mr. Vanner on appeal.

Initially, Mr. Vanner contends the district court erred in determining that the exhibits were introduced into evidence.[1] The record on appeal was supplemented with a transcript of the original hearing of the exception. Therein, counsel for OLOL stated, "I would like to also submit the exhibits which I have attached to our memorandum at this time to be filed in

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[1] In our original opinion, we provided that, if the district court determined that evidence was introduced at the hearing of the exception of prescription and the record was supplemented with that evidence, the appellant would have the right to assign as error this factual determination.

the record, along with our memorandum to the exception of prescription at this time." Clearly, the evidence supports the district court's factual determination that the exhibits were introduced at the hearing on the exception and there is no manifest error in that determination. Furthermore, although Mr. Vanner contends that those exhibits were improperly admitted, no such objection was raised at the trial of the exception. It is a well established rule of law that an objection to evidence must be made at the time of its offering, and failure to do so constitutes a waiver of the objection. **In re Medical Review Panel on Behalf of Laurent**, 94-1661 (La.App. 1 Cir. 6/23/95); 657 So. 2d 713. Therefore, the issue is not properly before this court and we will consider the exhibits in reviewing this case.

Next, Mr. Vanner contends that the district court erred in denying his motion for a continuance. A continuance may be granted on either peremptory or discretionary grounds. The peremptory grounds which require that a continuance be granted are not at issue in the instant case. LSA-C.C.P. art. 1602. Nevertheless, a continuance may be granted in any case if there is good ground therefor. LSA-C.C.P. art. 1601.

The trial judge must consider the particular facts in each case in deciding whether to grant or deny a continuance, Some factors to consider are diligence, good faith and reasonable grounds. **Sparacello v. Andrews**, 501 So. 2d 269 (La. App. 1 Cir. 1986), writ denied, 502 So. 2d 103 (La. 1987); **Katz v. Melancon,** 467 So. 2d 1284 (La.App. 4 Cir. 1985). Equally important is the exceptor's corollary right to have his case heard as soon as is practicable. **Lambert v. Heirs of Adams,** 325 So. 2d 331 (La.App, 3 Cir. 1975), writ denied, 329 So. 2d 458 (La. 1976). The trial judge may also weigh the

condition of the court docket, fairness to both parties and other litigants before the court, and the need for orderly and prompt administration of justice. **Keyes v. Johnson,** 542 So. 2d 209 (La.App. 3 Cir.), writ denied, 546 So. 2d 1215 (La. 1989).

Shortly after the alleged injury in 1989, Mr. Vanner discussed his claim with several attorneys. In September 3, 1993, he filed a medical malpractice claim with the Louisiana Patient's Compensation Fund in proper person. On February 28, 1994, OLOL and Dr. Bridges filed a petition and a peremptory exception of prescription in the district court. On March 7, 1994, the district court set the exception of prescription for April 18, 1994. On April 13, 1994, Mr. Vanner, in proper person, filed a motion for continuance. Therein, he contended that he needed sixty additional days to arrange for Dr. Neil Baum, Dr. Phillip Brantley, and his wife to testify. He stated that he intended to also call other witnesses and "possibly bring an attorney." The motion for continuance was heard on April 18, 1994, before the court took up the exception of prescription. At that time, Mr. Vanner put on no evidence and made no argument in favor of the motion except to state that he intended to hire an attorney and he wanted the court to continue the hearing on the exception of prescription until the medical review panel acted on the petition that was pending there.

By deposition, Mr. Vanner testified that he discussed this matter with at least three attorneys in 1989. There is no evidence that he made any attempt after that time, including once OLOL and Dr. Bridges filed the instant petition in the district court, to hire an attorney. Rather, his motion for continuance states that he might "bring an attorney," thereby indicating

that five days prior to the hearing on the exception he still had not decided to do so. Furthermore, Mr. Vanner offered the district court no reason why he had not called his witnesses to testify or taken their depositions prior to the hearing,

A trial judge is vested with wide discretion in granting or denying a continuance under LSA-C.C.P. art. 1601, and his ruling will not be disturbed on appeal in the absence of clear abuse. **Sauce v. Bussell,** 298 So. 2d 832 (La. 1974); **Coffman v. Mainhardt,** 602 So. 2d 264 (La.App. 2 Cir. 1992). Under the facts and circumstances of this case, we find that the trial court used sound discretion in denying Mr. Vanner's motion for continuance.

Finally, Mr. Vanner asserts that the district court erred in sustaining the exception of prescription. LSA-R.S. 9:5628 extends the filing of a malpractice claim to one year from the date of discovery of the alleged act, omission or neglect, but mandates filing at the latest within three years from the date of the alleged act, omission or neglect.

The record reflects that in November of 1988, Mr. Vanner went to Our Lady of the Lake Hospital regarding his sexual problems. He was interviewed and a questionnaire was prepared. Mr. Vanner was, then, referred to Dr. Bridges, whom he saw on February 2, 1989. At that time, Dr. Bridges injected Mr. Vanner with a drug called Papaverine. Mr. Vanner claims that thereafter his sexual problems worsened. On April 7, 1989, Mr. Vanner discontinued his treatment with Dr. Bridges.

Within two months thereafter, Mr. Vanner consulted an attorney, Alan Schwartzburg, concerning the matter. Mr. Schwartzburg referred Mr. Vanner to Dr. Neil Baum for a medical opinion. Dr. Baum rendered a report on June 19,

1989, which indicated that Mr. Vanner's dysfunction may be a complication of the Papaverine injection. Mr. Vanner testified in his deposition that Mr. Schwartzburg "looked at it and he felt like . . . from a lawyer's standpoint he didn't want to tackle" the case. Mr. Schwartzburg then referred Mr. Vanner to at least two other attorneys with whom Mr. Vanner discussed the case.

On September 3, 1993, more than three years later, Mr. Vanner filed a medical malpractice complaint with the Louisiana Patients' Compensation Fund against OLOL and Dr. Bridges. The complaint alleged, on February 2, 1989, Mr. Vanner went to OLOL for treatment of problems of premature ejaculation, but instead, he was negligently treated for impotency and this treatment worsened his condition.

Clearly, when Mr. Vanner consulted with Mr. Schwartzburg and received the report of Dr. Baum he had sufficient knowledge of the facts surrounding his treatment to question its appropriateness and effects. This conclusion is supported by his subsequent conversations with other attorneys. We find the record contains evidence sufficient to meet the burden of proof required of OLOL and Dr. Bridges. Mr. Vanner placed no evidence in the record in support of his contention that his action has not prescribed. Therefore, we find that the trial court correctly sustained the exception of prescription.

For the foregoing reasons, the judgment of the trial court is affirmed. Costs are assessed against the appellant.

AFFIRMED.

APPENDIX E

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA

RE: Docket Number 95/CA/0754

OUR LADY OF THE LAKE HOSPITAL, DR. CHARLIE BRIDGES, ET AL

—VERSUS— Parish of East Baton Rouge

JAKE VANNER

On application for Rehearing.

Rehearing DENIED

s/ Morris A. Lottinger, Jr.

s/ Frank Foil

s/ Kenneth J. Fogg

Filed May 8, 1997

s/ STANLEY P. LEMOINE, Clerk

APPENDIX F

THE SUPREME COURT OF THE STATE OF LOUISIANA

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VS. NO. 97-C - 1567

JAKE VANNER

IN RE: Vanner, Jake; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of East Baton Rouge 19th Judicial District Court Div. "F" Number 403,636; to the Court of Appeal, First Circuit, Number CA95 0754

September 26, 1997

Denied.

PFC
WFM
HTL
CDK
BJJ
JPV
JTK

TRAYLOR, J. not on panel.

Supreme Court of Louisiana
September 26, 1997

s/_____
Clerk of Court
For the Court

APPENDIX G

THE SUPREME COURT OF THE STATE OF LOUISIANA

OUR LADY OF THE LAKE HOSPITAL,
DR. CHARLIE BRIDGES, ET AL

VS. NO. 97-C - 1567

JAKE VANNER

IN RE: Vanner, Jake; – Defendant(s); Applying for Reconsideration of this Court's Order dated September 26, 1997; Parish of East Baton Rouge, 19th Judicial District Court Division "F" Number 403,636; to the Court of Appeal First Circuit Number CA95 0/54.

November 7, 1997

Reconsideration denied. Judgment is res judicata

HTL
PFC
WFM
CDK
BJJ
JPV
JTK

TRAYLOR, J, – not on panel.

Supreme Court of Louisiana

s/_____
Deputy Clerk of Court
For the Court